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8

9  
10 **UNITED STATES DISTRICT COURT**  
11 **NORTHERN DISTRICT OF CALIFORNIA**  
12 **OAKLAND DIVISION**

13 AOPTIX TECHNOLOGIES,

14 Case No. 13-cv-01105 (YGR) and Related  
15 Cases

16 Plaintiff,

17  
18 **ORDER RE DISCOVERY OF**  
19 **ELECTRONICALLY STORED**  
20 **INFORMATION FOR PATENT**  
21 **LITIGATION**

22 v.  
23  
24 BLUE SPIKE, LLC,

25 Defendant.

26  
27 BLUE SPIKE, LLC,

28 Case No. 14-cv-01647 (YGR)

29 Plaintiff,

30 v.  
31

32 ADOBE SYSTEMS, INC.,

33 Defendant.

BLUE SPIKE, LLC,

Case No. 14-cv-01648 (YGR)

Plaintiff,

V.

ZEITERA LLC,

Defendant.

BLUE SPIKE, LLC,

Case No. 14-cv-01649 (YGR)

Plaintiff,

V.

SOUNDHOUND INC.,

Defendant.

BLUE SPIKE, LLC,

**Plaintiff,**

V.

GOOGLE INC.,

Defendant.

Case No. 14-cv-01650 (YGR)

Upon the stipulation of the parties, the Court ORDERS as follows:

1. This Order supplements all other discovery rules and orders. It streamlines Electronically Stored Information (“ESI”) production to promote a “just, speedy, and

1 inexpensive determination of this action, as required by Federal Rule of Civil Procedure 1.”

2       2. This Order may be modified in the Court’s discretion or by stipulation.

3       3. As in all cases, costs may be shifted for disproportionate ESI production requests  
4 pursuant to Federal Rule of Civil Procedure 26. Likewise, a party’s nonresponsive or dilatory  
5 discovery tactics are cost-shifting considerations.

6       4. A party’s meaningful compliance with this Order and efforts to promote  
7 efficiency and reduce costs will be considered in cost-shifting determinations.

8       5. The parties agree to comply with the District’s E-Discovery Guidelines  
9 (“Guidelines”) and have utilized the District’s Model Stipulated Order Re: the Discovery of  
10 Electronically Stored Information for Patent Cases and Checklist for Rule 26(f) Meet and Confer  
11 regarding Electronically Stored Information.

12       6. Absent a showing of good cause, general ESI production requests under Federal  
13 Rules of Civil Procedure 34 and 45, or compliance with a mandatory disclosure requirement of  
14 this Court, shall not include metadata, except for (a) BEGBATES, (b) ENDBATES, (c)  
15 BEGATTACH, (d) ENDATTACH, (e) CONFIDENTIALITY, and (f) REDACTED. If  
16 available, the following should also be included: the filename of an electronic document (as  
17 FILENAME), the date the electronic document was created (as DATECREATED), and the date  
18 the electronic document was modified (as DATEMOD). If email (as defined below) is produced  
19 as provided herein, fields showing the date and time that the e-mail was sent and received, as  
20 well as the complete distribution list, shall generally be included in the production if such fields  
21 exist.

22       7. Absent agreement of the parties or further order of this Court, the following  
23 parameters shall apply to ESI production:

24       A. General Document Image Format. Each electronic document shall be  
25 produced in single-page Tagged Image File Format (“TIFF”) format. Documents  
26 that exist in hard copy format shall be scanned, and each document shall be  
27 produced in single-page TIFF format. TIFF files shall be single-page files and

1 shall be named with a unique production number followed by the appropriate file  
2 extension. Load files shall be provided to indicate the location and unitization of  
3 the TIFF files. If a document is more than one page, the unitization of the  
4 document and any attachments and/or affixed notes shall be maintained as they  
5 existed in the original document.

6 B. Text-Searchable Documents. The parties shall make their production text  
7 searchable, providing extracted text files (e.g., for electronic files) or  
8 commercially acceptable optical character recognition (“OCR”) (e.g., for hard  
9 copy documents that are scanned, electronic files that do not have an associated  
10 text file, or for redacted documents).

11 C. Footer. Each document image shall contain a footer with a sequentially  
12 ascending production number.

13 D. Native Files. A party that receives a document produced in a format  
14 specified above may make a reasonable request to receive the document in its  
15 native format (by way of example, non-standard file types, oversized documents  
16 or spreadsheets), and upon receipt of such a request and for good cause, the  
17 producing party shall produce the document in its native format. Documents  
18 produced in native format will have a unique production number and  
19 confidentiality designation in the filename of the native file.

20 E. No Backup Restoration Required. Absent a showing of good cause, no  
21 party need restore any form of media upon which backup data is maintained in a  
22 party’s normal or allowed processes, including but not limited to backup tapes,  
23 disks, SAN, and other forms of media, to comply with its discovery obligations in  
24 the present case.

25 F. Voicemail and Mobile Devices. Absent a showing of good cause,  
26 voicemails, instant messages, WebEx, PDAs and mobile phones are deemed not  
27 reasonably accessible and need not be collected and preserved.

1           G.     De-Duplication. A party is only required to produce a single copy of a  
2 responsive document and a party may de-duplicate responsive ESI across  
3 custodians. If email is produced as provided herein, a party may also de-duplicate  
4 “near duplicate” email threads as follows: In an e-mail thread, only the final-in-  
5 time document need be produced, assuming that all previous e-mails in the thread  
6 are contained within the final message and unchanged. Where a prior e-mail  
7 contains an attachment, that e-mail and attachment shall not be removed as a  
8 “near-duplicate.”

9           8.     General ESI production requests under Federal Rules of Civil Procedure 34 and  
10 45 shall not include email or other forms of electronic correspondence (collectively “email”). To  
11 obtain email parties must propound specific email production requests.

12           9.     Email production requests shall only be propounded for specific issues, rather  
13 than general discovery of a product or business.

14           10.    Email production requests shall be phased to occur after the parties have  
15 exchanged initial disclosures and basic documentation about the patents, the prior art, the  
16 accused instrumentalities, and the relevant finances. While this provision does not require the  
17 production of such information, the Court encourages prompt and early production of this  
18 information to promote efficient and economical streamlining of the case.

19           11.    Email production requests shall identify the custodian, search terms, and time  
20 frame. The parties shall cooperate to identify the proper custodians, proper search terms and  
21 proper timeframe as set forth in the Guidelines.

22           12.    Each requesting party shall limit its email production requests to a total of five  
23 custodians per producing party for all such requests. The parties may jointly agree to modify this  
24 limit without the Court’s leave. The Court shall consider contested requests for additional  
25 custodians, upon showing a distinct need based on the size, complexity, and issues of this  
26 specific case. Cost-shifting may be considered as part of any such request.

1       13. Each requesting party shall limit its email production requests to a total of five  
2 search terms per custodian per party. The parties may jointly agree to modify this limit without  
3 the Court's leave. The Court shall consider contested requests for additional search terms per  
4 custodian, upon showing a distinct need based on the size, complexity, and issues of this specific  
5 case. The Court encourages the parties to confer on a process to test the efficacy of the search  
6 terms. The search terms shall be narrowly tailored to particular issues. Indiscriminate terms,  
7 such as the producing company's name or its product name, are inappropriate unless combined  
8 with narrowing search criteria that sufficiently reduce the risk of overproduction. A conjunctive  
9 combination of multiple words or phrases (*e.g.*, "computer" and "system") narrows the search  
10 and shall count as a single search term. A disjunctive combination of multiple words or phrases  
11 (*e.g.*, "computer" or "system") broadens the search, and thus each word or phrase shall count as a  
12 separate search term unless they are variants of the same word. Use of narrowing search criteria  
13 (*e.g.*, "and," "but not," "w/x") is encouraged to limit the production and shall be considered  
14 when determining whether to shift costs for disproportionate discovery. Should a party serve  
15 email production requests with search terms beyond the limits agreed to by the parties or granted  
16 by the Court pursuant to this paragraph, this shall be considered in determining whether any  
17 party shall bear all reasonable costs caused by such additional discovery.

19       14. The parties have discussed their preservation obligations and needs and agree that  
20 preservation of potentially relevant ESI will be reasonable and proportionate. To reduce the costs  
21 and burdens of preservation and to ensure proper ESI is preserved, the parties agree that:

22       a. These data sources are not reasonably accessible because of undue burden or cost  
23           pursuant to Fed. R. Civ. P. 26(b)(2)(B) and ESI from these sources will be  
24           preserved pursuant to normal business retention, but not searched, reviewed, or  
25           produced:

26           i. backup systems and/or tapes used for disaster recovery; and  
27           ii. systems no longer in use that cannot be accessed.

b. Among the sources of data the parties agree are not reasonably accessible, the parties agree not to preserve the following:

- i. voicemail messages
- ii. information from handsets, mobile devices, personal digital assistants, and tablets that is duplicative of information that resides in a reasonably accessible data source;
- iii. instant messaging;
- iv. automatically saved versions of documents and emails;
- v. video and audio recordings;
- vi. deleted, slack, fragmented, or other data accessible only by forensics;
- vii. random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system;
- viii. on-line access data such as temporary internet files, history, cache, cookies, and the like;
- ix. dynamic fields of databases or log files that are not retained in the usual course of business; and
- x. data in metadata fields that are frequently updated automatically, such as last opened dates.

15. Pursuant to Fed. R. Evid. 502(d), the production of a privileged or work-product-protected document, whether inadvertent or otherwise, is not a waiver of privilege or protection from discovery in this case or in any other federal or state proceeding. Disclosures among defendants' attorneys of work product or other communications relating to issues of common interest shall not affect or be deemed a waiver of any applicable privilege or protection from disclosure. For example, the mere production of privileged or work-product-protected documents in this case as part of a mass production is not itself a waiver in this case or in any other federal or state proceeding. A producing party may assert privilege or protection over produced documents at any time by notifying the receiving party in writing of the assertion of

1 privilege or protection. Information that contains privileged matter or attorney work product  
2 shall be returned immediately if such information appears on its face to have been inadvertently  
3 produced or if requested.

4 16. Nothing in this Order prevents the parties from agreeing to use technology  
5 assisted review and other techniques insofar as their use improves the efficacy of discovery.  
6 Such topics should be discussed pursuant to the District's E-Discovery Guidelines.  
7

8 **IT IS SO STIPULATED**, through Counsel of Record.

9 Dated: 10/2/2014

*/s/ Randall T. Garteiser*

10 Randall T. Garteiser  
11 Counsel for Plaintiff Blue Spike, LLC

12 Dated: 10/2/2014

*/s/ Eugene Y. Mar*

13 Eugene Y. Mar  
14 Counsel for Defendant Adobe Systems,  
15 Inc.

16 Dated: 10/2/2014

*/s/ Bryan A. Kohm*

17 Bryan A. Kohm  
18 Counsel for Plaintiff and Counter-  
19 Defendant AOptix Technologies, Inc.,  
Defendant SoundHound, Inc., and  
Defendant Zeitera, LLC

20 Dated: 10/2/2014

*/s/ Nicholas H. Lee*

21 Nicholas H. Lee  
22 Counsel for Defendant Google Inc.

23  
24 So ORDERED and SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2014  
25  
26  
27  
28

YVONNE GONZALEZ ROGERS  
UNITED STATES DISTRICT JUDGE

## **SIGNATURE ATTESTATION**

Pursuant to General Order No. 45(X)(B) and Local Rule 5(i)(3), I hereby certify that concurrence in the filing of this document has been obtained from each of the signatories shown above.

/s/ Nicholas H. Lee  
Nicholas H. Lee